No. 84-262

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY,
Petitioner,
v.
PUEBLO OF SANTA ANA,
Respondent

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE PUEBLO OF TAOS IN SUPPORT OF PUEBLO OF SANTA ANA

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January 7, 1985

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BRIEF AMICUS CURIAE OF THE PUEBLO OF TAOS IN SUPPORT OF PUEBLO OF SANTA ANA

The Pueblo of Taos, New Mexico, files this brief amicus curiae in support of Respondent pursuant to Rule 36 of the Supreme Court Rules.

STATEMENT OF INTEREST

The Pueblo of Taos has a direct interest in the Court's disposition of this proceeding. Petitioner owns and operates a telephone line installed on Taos Pueblo lands (the "§ 17 Line"), the right-of-way for which was obtained under § 17 of the Pueblo Lands Act of 1924, 43 Stat. 636 (the "1924 Act"). On December 29, 1982, the United States sued the Petitioner on behalf of Taos Pueblo to obtain a judgment that such right-of-way was null and void, that Petitioner be ejected from Taos Pueblo lands and be required to pay damages for its unauthorized use of the Pueblo's lands. U.S. v. Mountain States Tel. & Tel. Co., et. al., No. 82-1513. The Pueblo is not a party to that suit, but it supports the position of the United States therein. The suit is held in suspense by order based on the agreement of the parties pending the

outcome of this appeal.

The § 17 Line was obtained by Petitioner for a recited consideration of $48 under an instrument dated February 3, 1927, executed by representatives of the Pueblo, which purported to grant an easement on Pueblo lands for a telephone and telegraph "pole line" then in existence. The instrument does not contain a precise survey description of the land affected, the acreage covered by the purported easement, or the term of the rights granted. The instrument referred to an earlier, possibly defective instrument, which apparently purported to grant a similar right-of-way for a consideration of $194.50. The instrument was approved by the Commissioner of Indian Affairs on March 8, 1927, and by the Assistant Secretary of the Interior on March 10, 1927, "in accordance with the provisions of section 17" of the

1924 Act.

Petitioner was named a defendant in U.S. v. Wooten, No. 1784 Eq. (40 F.2d 882, 10th Cir. 1930), the quiet title suit brought under § 3 of the 1924 Act with respect to Taos Pueblo lands. After approval of the right-of-way for the § 17 Line by the Secretary, the Wooten complaint against petitioner was dismissed pursuant to stipulation on November 18, 1927.

SUMMARY OF ARGUMENT

1. Section 17 of the 1924 Act cannot reasonably be construed to authorize grants of Pueblo Indian land subject only to approval by the Secretary of the Interior.

2. Congress confirmed Respondent's construction of § 17 by enacting specific right-of-way statutes for Pueblo Indian land on May 10, 1926, 44 Stat. 498 (the "1926 Act"), and April 21, 1928, ch. 400, § 1, 45

Stat 442, 25 U.S.C. § 322 (the "1928 Act").

3. Petitioner's construction of § 17 is repugnant to the 1926 and 1928 Acts and to the Act of February 5, 1948, c. 45 § 1, 62 Stat. 17, 25 U.S.C. § 323 to 328 (the "1948 Act").

4. Taos Pueblo endorses the additional arguments presented by Respondent and the other amici Pueblos.

ARGUMENT

1. SECTION 17 OF THE 1924 ACT CANNOT REASONABLY BE CONSTRUED TO AUTHORIZE GRANTS OF PUEBLO LAND SUBJECT ONLY TO APPROVAL BY THE SECRETARY OF THE INTERIOR.

Taos Pueblo endorses and supports the interpretation of § 17 set forth at length in Respondent's briefs herein and in the amicus briefs filed by other Pueblos in support thereof.

The 1924 Act expressly stated in its introductory section that Congress acted "in its sovereign capacity as guardian of said

Pueblo Indians." That capacity had been established with respect to the Pueblo Indians by (a) the Act of February 27, 1851, ch. 14, § 7, 9 Stat. 25, which extended to the Indian tribes of New Mexico the protection of the Nonintercourse Act of 1834, 25 U.S.C. § 177; (b) the Act of July 22, 1854, 10 Stat. 308, which created the office of the Surveyor General of New Mexico with specific instructions to determine the location and extent of Pueblo lands; (c) the Act of December 22, 1858, 11 Stat. 374, which confirmed the Surveyor General's surveys of Pueblo grant lands subsequently patented to them in 1864; and (d) the New Mexico Enabling Act of June 20, 1910, 36 Stat. 557, which recognized that the Pueblo Indians were under exclusive federal jurisdiction. The authoritative decisions of this Court relied, in addition, upon an unbroken succession of

Congressional acts in fulfillment of the government's guardianship role. U.S. v. Sandoval, 231 U.S. 28 (1913); U.S. v. Candelaria, 271 U.S. 432 (1926); U.S. v. Chavez, 290 U.S. 354 (1933).

In the Tenth Circuit, the federal courts have uniformly held that Pueblo lands have always been inalienable, under the federal guardianship, without Congress' authority. U.S. v. Algodones Land Co., 52 F.2d 359 (10th Cir. 1931); Alonzo v. U.S., 249 F.2d 189 (10th Cir. 1957); N.M. v. Aamodt, 537 F.2d 1102 (10th Cir. 1976); Plains Electric G & T Coop. v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1977). The decision below is merely the most recent in an unbroken series of precedents. Only certain decisions of the territorial and state courts deviated from the consistent federal recognition of the guardianship of the Pueblo Indians and the

concomitant restraint on alienation of their lands. Territorial law, however, was not part of governing federal law. See U.S. v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 704 (1899). For that reason, this Court's acceptance of the territorial court's description of the Pueblos in U.S. v. Joseph, 94 U.S. 614 (1876)[1], was not considered authoritative or binding when the question of Congress' power to establish the federal

---

1 The Joseph decision recognized that a non-Indian in possession of Pueblo land "without the consent of the inhabitants. . . may be ~~either cited~~ or punished civilly, by a suit for trespass," 94 U.S. 614, 619. The case sustained demurrers to defective petitions to collect the penalty imposed by § 11 of the Nonintercourse Act on persons wrongfully occupying Taos Pueblo land. The Court's opinion did not consider whether Congress had the authority or intent to protect Pueblo lands against unauthorized alienation under § 12 of the Nonintercourse Act, and it did not deny the existence of the federal guardianship recognized by later decisions since the beginning of American sovereignty.

guardianship of the Pueblos was presented in the Sandoval case or in the Candelaria case when the origin of the guardianship was established. No federal court has ever held that the Pueblos were not under the federal guardianship or that the Pueblos were free to dispose of their lands without authority from Congress.

The 1924 Act was enacted in fulfillment and in furtherance of the federal guardianship of Pueblo lands. Non-Indians then in possession of Pueblo grant lands claimed ownership under purported "sales, grants, leases of various kinds, and other conveyances" by a Pueblo or an individual Pueblo Indian. Some of those instruments had been approved by the Secretary of the Interior under existing laws: tribal farming leases had been authorized in 1894, 25 U.S.C. § 402, mining leases in 1919 and 1921, 25 U.S.C.

§ 399, rights-of-way for highways, railways and telephone lines in 1899, 1901, 1904, and 1909, 25 U.S.C. §§ 311-321, grazing leases in 1891, 25 U.S.C. § 397, oil and gas or mining leases in 1909 and 1924, 25 U.S.C. §§ 396 and 398, contracts for farm lands in 1916 and 1921, 25 U.S.C §§ 393-394, and timber stumpage in 1910 and 1921, 25 U.S.C. §§ 406-407.

Congress' solution to the tangled titles and conflicting claims within Pueblo grants was to create the Pueblo Lands Board to determine which "private claims" should be confirmed and the Pueblos' title extinguished. The criteria for confirmation were set forth in § 4: continued possession with color of title since 1902 or without color of title since 1889.

The language of § 17 seems clear and unambiguous in the context of its enactment

on June 7, 1924. The first clause "hereafter" prohibited any "right, title, or interest" in Pueblo lands "in any. . .manner" except "as may hereafter be provided by Congress." The second clause invalidated any "sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto" by a Pueblo or individual Indian "unless the same be first approved by the Secretary of the Interior." The second clause was an instruction to the Pueblo Lands Board and the federal courts with respect to instruments that might be offered in support of "private claims" under the 1924 Act. Congress intended thereby to protect any non-Indian interests properly approved by the Secretry in accordance with preexisting law against invalidity in the quiet title suits authorized in § 3. The first clause of § 17 looks forward; the second looks back. In the

future, no interest can be acquired unless Congress "hereafter" legislates. In the past, however, when Congress had failed to repudiate the erroneous judgments of the territorial and state courts, a variety of Pueblo and Indian instruments had been issued. Those were expressly invalidated by the second clause, unless "first approved" by the Secretary. Unspoken was the implied reference to the Secretary's extensive existing authority to approve various interests in Indian lands. If "first approved" an Indian grant was not necessarily valid. Approval under existing law saved the instrument from invalidity under § 17, but § 17 did not validate any pre-enactment action. Valididty was to be decided by the Board or the federal court, but they had no jurisdiction under the Act to consider post-enactment actions.

The Board determined that non-Indian claimants to lands within the Pueblo grants had acquired no rights of any kind under territorial or state law; their claims could be validated only under § 4 of the Act. The federal courts sustained that determination of the Board's in quiet title suits filed under § 3 of the Act. U.S. v. Woodford, No. 1630 Eq. [Tesuque Pueblo], Order entered December 5, 1928; U.S. v. Herrera, No. 1720 .Eq. [Nambe Pueblo], Per Curiam Order entered May __, 1928; Garcia v. U.S., 43 F.2d 873, 878 (10th Cir. 1930) [San Juan Pueblo].

Congress' intent in § 17 was nevertheless frustrated by erroneous decisions of the Board's attorney, Special Assistant Attorney General George Fraser, who first concluded that existing statutes relating to Indian lands did not apply to the Pueblos because Congress had confirmed their

grants and had not concluded treaties with them. His erroneous decision required the Board to invalidate any pre-enactment rights-of-way or other interests in Pueblo lands previously approved by the Secretary. The Board's action was later cited by Congress as the reason for its enactment of the 1926 Act. To escape that harsh--and completely unnecessary and unwarranted--result, Mr. Fraser decided to treat as valid post-enactment rights-of-way approved under § 17. This was an obvious nonsequitur because the second clause of § 17 was intended only to invalidate pre-enactment Indian grants (unless approved by the Secretary under existing law); post-enactment interests were expressly barred except as authorized under later statutes, like the 1926 and 1928 Acts.

Petitioner, and the United States as

amicus, distorts this clear interpretation of § 17 by concocting the "voluntary-involuntary" distinction. Nowhere in § 17 or its legislative history, or in any document connected with the contemporaneous 1926 and 1928 Acts, did Congress suggest such a distinction between the first and second clauses of § 17. George Fraser tentatively suggested such a distinction in his explanatory letter as a way of resolving the "seeming contradiction" between the two clauses, but the "seeming contradiction" only existed because he erroneously concluded the Secretary had no preexisting authority over Pueblo lands. The present parties, seeking to sustain Fraser's error, argue that no other interpretation of § 17 is plausible. Instead, the obvious interpretation set forth above not only conforms to the facts of 1924, the language of the Act, and the mechanism created to resolve

the title problems of the Pueblos, but it proves how wrong Mr. Fraser was with respect to pre-enactment easements approved by the Secretary. The Court should not accept this effort to perpetuate an ancient error.

Congress by the second clause of § 17 did not intend to authorize the Secretary of the Interior at any time in the future to grant rights-of-way or other interests in Pueblo lands. The analyses of § 17 by Petitioner and the United States as amicus ignore the opening prohibition against any interest in Pueblo land being acquired "hereafter," after the date of enactment. If the Secretary, acting in accordance with existing law, had approved instruments before the date of enactment "made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians," they could be accepted by the Board and the federal courts

as having "validity in law or in equity" for purposes of validating a claim under § 4 or § 5. But the first clause of § 17 barred any post-enactment action by the Secretary except in accordance with subsequent legislation. The construction urged by Petitioner asks the Court to ignore the effect of the first clause -- by treating it as "separate" from the second clause and limited to "involuntary" transactions -- and the fact that Congress did not in § 17 expressly delegate power to the Secretary as it did in § 16 of the Act.

The language of the second clause says that no purported conveyance of land by a Pueblo or Pueblo Indian shall be valid unless first approved by the Secretary. Giving effect to the first "hereafter" in the first clause requires the second clause to be limited to pre-enactment periods, not

extended into the indefinite future regardless of laws "hereafter [to] be provided by Congress." The negative language of the second clause does not imply the converse. Subsequent authorization was a precondition for acquisition of any interest in Pueblo lands "in any. . .manner," including a voluntary transfer by a Pueblo. There is no principle of logic or statutory construction under which an affirmative grant of power may be inferred from an express denial of the power. The analogy to § 12 of the Nonintercourse Act drawn by Francis Wilson, who drafted the language, does not suggest a waiver of restraints on alienation for post-enactment periods. Wilson stated that he had adapted the language of § 12 of the Nonintercouse Act to conform to conditions peculiar to the Pueblo. Those conditions included improvident conveyances

by Pueblos and individual Indians, which were expressly invalidated by the second clause of § 17, saving only those instruments that had been approved by the Secretary under existing law.

In that context, the first clause of § 17 served as general notice of the requirement for congressional authority before any acquisition of an interest in Pueblo lands could be acquired after June 7, 1924. The second clause gave specific notice that the Pueblos and their individual members could no longer consent to conveyances of interests in their lands without first obtaining the approval of the Secretary, who would then, under the first clause, have to determine whether or not congressional authority for such conveyances existed. The second clause thus ensured that the Secretary, rather than the Indians, would be

responsible for determining what their rights were with respect to land transactions. Such control was intended to prevent a recurrence of the conditions that left the Pueblos for over half a century dependent upon their own uninformed judgment with respect to land transactions.

Unfortunately, Congress' intent was frustrated by George Fraser's mistake. Once begun, his error was repeated and perpetuated, but like any error, it was baseless, and the Court should now correct it by affirming the court below. Perpetuation of an error by subordinate employees is not entitled to the dignity of an official administrative interpretation intended by Congress to flesh out the bare bones of its statutory language. Here, it is obvious that Mr. Fraser's error defeated Congress' intent, which was clearly expressed in the language,

as the courts below held, and its subsequent actions with respect to Pueblo lands were consistent with that interpretation and inconsistent with the Petitioner's contention that § 17 was a general, unrestricted grant of authority to the Secretary to approve <u>any</u> disposition of Pueblo Indian lands at any time in the future. Their argument claims too much. Like the contention that negative terms constitute an affirmative grant of authority, Petitioner would have the Court approve what Congress took pains to prevent.

2. CONGRESS CONFIRMED RESPONDENT'S CONSTRUCTION OF § 17 BY ENACTING SPECIFIC RIGHT-OF-WAY STATUTES FOR PUEBLO INDIAN LAND IN 1926 AND 1928.

Congress passed the 1926 Act after it was advised that the Pueblo Lands Board had decided that existing statutes for acquiring rights-of-way over Indian land did not apply to the Pueblos. In the legislative history

of that Act, Congress did not suggest that it was authorizing condemnation of Pueblo lands under state law because a right-of-way was not obtainable under § 17. The suggestion in the government's amicus brief (pp. 24-25), that "it seems reasonable to assume that Congress was apprised of the circumstances" that two Pueblos approved rights-of-way "under Section 17" while a third refused, is completely unwarranted. Congress responded to an apparent need to provide a means for acquiring rights-of-way for legitimate projects. Had it believed § 17 authorized such a grant, no further legislation would have been necessary. Its opposite conclusion and passage of the 1926 Act prove that Congress did not construe § 17 as Petitioner now contends.

As stated in Plains Electric G & T Corp. v. Pueblo of Laguna, 542 F.2d 1375, 1377

(10th Cir. 1977), the federal district court later held the 1926 Act defective because it failed to authorize joinder of the United States, the Pueblo's guardian, as a party defendant in the condemnation action. Congress then passed the 1928 Act making applicable to Pueblos the existing right-of-way statutes, under which the Secretary had previously granted rights-of-way on Pueblo lands. Congress thus repudiated George Fraser's fundamental error, and by implication, his erroneous construction of § 17.

The Tenth Circuit held in Plains Electric that the 1926 Act was repugnant to the 1928 Act and that the earlier law was therefore repealed by implication. The only possible inference from that action is Congress' understanding that, pursuant to § 17 of the 1924 Act, Secretarial authority

to grant rights-of-way over Pueblo lands must be given by new legislation. Congress obviously did not construe § 17 as an effective grant of authority to the Secretary to approve interests in Pueblo lands.

3. PETITIONER'S CONSTRUCTION OF § 17 IS REPUGNANT TO THE 1926, 1928, AND 1948 ACTS.

The legislative history of the 1926, 1928, and 1948 Acts, not considered by Petitioner or the United States amicus, contains no suggestion that § 17 previously authorized grants of rights-of-way by the Secretary with tribal consent. Had Congress understood § 17 to have that effect, it surely would have commented upon its relationship to the later statutes. Section 17 was not mentioned because Congress did not believe it had the legal effects erroneously attributed to it by Mr. Fraser originally and latterly by Petitioner and its supporters.

In the 1926, 1928, and 1948 Acts Congress provided specific methods of acquiring rights-of-way on Pueblo lands. In each case, an applicant had to meet stated requirements. In the short-lived 1926 condemnation Act, state requirements for condemnation actions were mandated, and the 1928 and 1948 Acts contemplated regulations to protect Indian interest. 25 U.S.C. §§ 322, 328. Petitioner's construction of § 17 proposes an evasion of such requirements by Secrtarial approval outside regularly established procedures.

The proposed construction is unsatisfactory because it infers affirmative authority from negative language, is not supported by even the slightest indication of Congressional approval, and creates an exception for the the Pueblos from the general system of protection applicable to

Indian tribes generally. Petitioner's § 17 Line on Taos Pueblo land, for instance, does not comply with the requirements of the regulations authorized by Congress. 25 C.F.R. § 169.1 et seq. Congress surely did not intend to accord the Pueblos less protection than other Indian tribes by permitting an evasion of the safeguards of the 1926, 1928, and 1948 Acts and their attendant regulations and requirements. Any post-1926 right-of-way approved under § 17 without compliance with the requirements of the 1926, 1928, or 1948 Acts should, therefore, be held void for failure to satisfy the specific protective requirements of those statutes. In 1927, Petitioner could have acquired its right-of-way by condemnation under the 1926 Act or from the Secretary under the Acts of March 2, 1899, or March 3, 1901 [25 U.S.C. §§ 312-314, 318]. Consensual

agreements with the Pueblos were never prohibited or discouraged. There was obviously no need for Mr. Fraser's attempted circumvention under § 17, and the consruction of that provision required to justify the attempt was repugnant to Congress' actions in 1926, 1928, and 1948, which were clearly consistent with § 17.

4. TAOS PUEBLO ENDORSES THE ADDITIONAL ARGUMENTS PRESENTED BY RESPONDENT AND THE OTHER AMICI PUEBLOS.

The other principle arguments presented in opposition to Petitioner's claims are (a) the irrelevancy of administrative practice that is inconsistent with a statute, and (b) the non-binding effect of the dismissal of Petitioner from the quiet title suits instituted pursuant to § 3 of the 1924 Act.

With respect to the first argument, the record discloses that the original error of George Fraser's was perpetuated by various

officials without further legal opinion, ruling or regulation. The history of these actions is less a "course of administrative interpretation" than an uncertain, rather sheepish repetition of the original error, as if to avoid impeaching the earlier actions by further unauthorized approvals. After the 1948 Act, only a few rights-of-way for irrigation or drainage works were approved under § 17, and no instruments have been approved since 1959. [Kelly Report, p. 68.] Congress' intent and the underlying purpose of § 17 are clear, and the inconsistent actions of subordinate employees of the executive branch may properly be ignored upon the authorities cited in Respondent's briefs.

The second argument refers to judicial actions, rather than executive, that also followed from Mr. Fraser's error. The dismissal of Petitioner from the Brown case

involving Respondent's lands was repeated in the district court's dismissal of the Petitioner in the Wooten case pertaining to Taos Pueblo's lands. Those actions obviously did not involve any adjudication on the merits (although Petitioner had filed an answer in Wooten shortly before entry of the "decree" of dismissal); nor did the Court have jurisdiction under § 3 of the 1924 Act to review, consider, and approve Mr. Fraser's erroneous construction of § 17. Cf. Cramer v. U.S., 261 U.S. 219, 230-234 (1923). The court entered the dismissal because the government was willing to drop its claims against Petitioner. There was no "consent decree" sufficient to validate Petitioner's § 17 Line under § 5 of the 1924 Act. The government merely dropped its challenge of Petitioner's claims because the Secretary had approved the right-of-way. For the reasons

stated in Respondent's briefs, and in the United States' amicus brief, the court's action had no res judicata effect. The pending action instituted by the United States to recover damages for Taos Pueblo based upon Petitioner's unauthorized use of its property for telephone purposes should go forward in the district of New Mexico.

CONCLUSION

For the foregoing reasons, Taos Pueblo prays as amicus curiae that the decision of the Tenth Circuit Court of Appeals below be affirmed. The practical consequences of this action are not significant, the Secretary of the Interior no longer considers § 17 a valid basis for approving Pueblo grants of rights-of-way or other interests as indicated by the Solicitor's letter dated October 31, 1984, attached as an appendix hereto, and the language and intent of the 1924 Act plainly

justify the decision below.

Respectfully submitted,

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CONSENT TO FILING OF TAOS PUEBLO
BRIEF AMICUS CURIAE

The undersigned hereby consent to the filing on behalf of Taos Pueblo of a brief amicus curiae in support of the respondent herein.

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PROOF OF SERVICE OF TAOS PUEBLO
BRIEF AMICUS CURIAE

I, WILLIAM C. SCHAAB, attorney for Taos Pueblo, amicus curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 5th day of January, 1985, I served copies of the foregoing Brief Amicus Curiae on the several parties thereto, as follows:

1. On the United States, by leaving a copy thereof at the office of William L. Lutz, Esq., United States Attorney for the District of New Mexico, at the Federal Building, 500 Gold S.W., 12th Floor, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C. 20530.

2. On the Petitioner and other amici curiae, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

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